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No. 87-998

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

v.

J. A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern represents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court for the past twelve years, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), cert. denied, 469 U.S. 871 (1984); and *Aetna Life Insurance Company v. Lavoie*, 475

U.S. 813 (1986).

Southeastern has filed numerous *amicus curiae* briefs in the federal courts at all levels expressing its opposition to racial preferences. Southeastern submitted its views in *United Steel Workers of America v. Weber*, 563 F.2d 216 (5th Cir. 1977), reversed 443 U.S. 193 (1979); *Cramer v. Virginia Commonwealth University*, 586 F.2d 297 (4th Cir. 1978); and *S. J. Groves and Sons Company v. Fulton County, Georgia*, Civil Action File Number C82-1895A (U.S.D.C. N.D.Ga.). In November, 1987, Southeastern represented two non-minority sub-contractors in the United States District Court for the Eastern District of North Carolina, challenging the administration of the minority and disadvantaged business enterprise provision of the Surface Transportation Assistance Act of 1982 by the North Carolina and United States Departments of Transportation. *Joe Carpenter, et al. v. Elizabeth Dole, et al.*, Civil Action File Number 85-527-CIV-5 (U.S.D.C. E.D.N.C.).

The issue of the level of findings necessary to justify the implementation of remedial racial preference programs, addressed in this brief, is of crucial importance to all citizens and local governments throughout the United States.

STATEMENT OF THE CASE

Amicus adopts the statement of the case contained in the brief on behalf of Appellee, J. A. Croson Company.

SUMMARY OF ARGUMENT

In order to utilize racial preferences for remedying the present effects of past discrimination, a governmental entity must have a strong factual basis for such action. In concluding that the program challenged in this case was insufficient on this and other points, the Court of Appeals correctly applied decisions of this court such as *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which requires a finding of discrimination by the governmental entity seeking to utilize the racially preferential criteria.

In arguing that the necessary factual predicate can be established by conclusory allegations of racial discrimination by private parties, and in arguing that general population statistics may be utilized to establish discrimination, Appellant overlooks the requirements set forth in decisions of this Court for actual proof of discrimination.

In determining whether there has been discrimination in the awarding of construction contracts by a city, it is insufficient merely to compare the number of contracts awarded to minority firms with the percentage of minority citizens in the general population. Decisions of this Court, several circuit courts rendered since *Wygant*, and other authorities all reject reliance on general population statistics for this purpose.

There are at least four reasons for not allowing proof of discrimination, in the context of a factual predicate for racial preferences in the awarding of public contracts, through the use of general population statistics. Among these reasons are the inherent unreliability of such information, the possibility for political abuse of such programs, and an inherent inconsistency between utilization of such data and the objective of narrowly tailoring the use of racially preferential criteria to an identifiable problem of racial discrimination.

ARGUMENT

I. INTRODUCTION

In this brief *amicus* Southeastern Legal Foundation, Inc. will deal primarily with the issue of whether there was a sufficient factual basis for utilization of racial preferences by the City of Richmond in its minority business utilization ordinance. *Amicus* will argue that the ordinance invalidated by the Court of Appeals was, as that court held, fatally flawed because of its reliance on general population statistics to establish the existence of racial discrimination.

II. BEFORE A GOVERNMENTAL ENTITY CAN UTILIZE RACIAL PREFERENCES FOR AWARDING PUBLIC CONTRACTS, THERE MUST BE FINDINGS OF PAST DISCRIMINATION SO AS TO DEMONSTRATE A COMPELLING STATE INTEREST IN THE USE OF RACIAL CRITERIA

A. *Appellant's Allegations of Discriminatory Conduct*

It is indisputable that a governmental entity, prior to utilizing racial preferences in the context of public contracts or elsewhere, must have a factual predicate for such actions, in order to withstand legal scrutiny. *E.g. Fullilove v. Klutznick*, 448 U.S. 448 (1980). This requirement is applicable to Congress, as in *Fullilove*, and equally, and perhaps more so, to lower level political entities such as municipalities. See *Regents of University of California v. Bakke*, 438 U.S. 265, 309 (1978).

As stated by one commentator, however, "requiring that discrimination be identified is one thing; describing what remediable discrimination must look like is quite another." Days, *Fullilove*, 96 Yale Law Journal 453, 481 (1987). The instant case presents the fundamental question of the minimal amount of

findings of racial discrimination which should be required of a municipality prior to utilization of racial preferences. *Amicus* submits that the Fourth Circuit Court of Appeals correctly described the Richmond situation in the following language: "If this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race." *J. A. Croson Company v. City of Richmond*, 822 F.2d 1355, 1357-58 (4th Cir. 1987).

In this brief *Amicus* contends that the analysis of this issue by the court below was consistent with that required by previous decisions of this Court, such as *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842 (1986).

It is revealing to examine closely what Appellant would have this Court adopt as a standard for measuring the sufficiency of findings of racial discrimination. From an examination of Appellant's arguments it appears that the City's fundamental contention is as follows. In determining whether there has been discrimination so as to justify utilization of racial preferences, the relevant inquiry is to compare the number of minority firms actually receiving prime contracts from the city—noticeably, there is a glaring failure to discuss the amount of *subcontracted* work going to minorities—with the minority population percentage in the City. Appellant's brief, pp. 3, 21 and 40.

This reliance on general population statistics to establish discrimination, while sometimes appropriate in the context of unskilled employment, is ill-founded in a determination of whether there has been discrimination, either public or private, in the awarding of construction contracts by a municipality.

Appellant's brief also assumes the existence of certain facts which, if part of the record, are present only in the form of conclusory allegations. For example, Appellant's analysis begins with the conclusion that:

> In a city that is half minority and that awards $124 million in city construction contracts over a five-year period, one would expect minority businesses to be awarded much more than two-thirds of one percent of those contracts, absent discrimination. Because the number of minority contractors in Richmond was "quite small," J.S. App. 7a, this discrimination must have been in the industry itself. Appellant's Brief, pp. 20-21.

Appellant thereafter repeatedly contends that the Richmond ordinance was "predicated on identified, purposeful discrimination in Richmond's construction industry that had caused an extraordinary racial imbalance in the awarding of city construction contracts," Appellant's brief, p. 40, and that the "disparity between the percentage of city contracts awarded to minority businesses and the percentage of minorities in Richmond — less than one percent versus fifty percent — is so enormous that by itself it creates a strong inference of discrimination." *Id.* at p. 20. Appellant also relies upon evidence as to low or non-existent minority membership in certain trade groups whose members are likely to participate in bidding for the City of Richmond's construction contracts. *Id.* at pp. 4-5. From these factors Appellant assumes — and asks this Court to assume — that discrimination in the private sector is the cause of low minority representation among firms receiving construction contracts from the City of Richmond.

This assumption, the first and weakest link in Appellant's argument, is fundamentally an attempt to persuade this Court to decide this case on the basis of factual determinations which are not supported by the record of proceedings, either in the lower courts or

in the Richmond City Council. Appellant contends that the *Wygant* requirement of discrimination "by the government unit involved", *Wygant*, 106 S.Ct. at 1847, is not applicable. Appellant's brief, pp. 33-41. Appellant also suggests that the City of Richmond has been a "passive participant" in discrimination alleged to have been engaged in by private parties. Appellant's brief, p. 40. In fact, however, the evidence of that discrimination, upon which Appellant seeks to rely, is, first an assumption by Appellant, and, as the Court of Appeals noted, in the form of conclusory allegations and statistical data which are similarly not probative. *Croson*, 822 F.2d at 1358.

B. ***The Applicable Legal Standard***

Appellant's argument itself demonstrates the urgent need for definitive standards and guidance as to what factual predicate must exist before a governmental body can utilize racial preferences in awarding public contracts and for other purposes. Moreover, the existence of an increasingly large number of state and local enactments of this type, noted by Appellants and in briefs by *amici* such as the National League of Cities, also demonstrates the need for such guidance from this Court in establishing standards for judicial review of racially preferential legislative enactments.

In the final analysis, Appellant's argument overlooks the burden of proof which this Court has held applicable to governmental use of racial criteria for remedial purposes.

This Court has often held that the burden is on the governmental entity seeking to utilize racial preferences to establish that it passes the two-pronged test set forth in *Fullilove*, *Wygant*, and elsewhere. This burden of proof is entirely different from the situation in which there has been a definitive finding of past discrimination, as in *U.S. v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053 (1987). As

noted by Justice Stevens' concurring opinion in that case, where there has been a finding of illegal discrimination, the burden of proof is "precisely the opposite of that in cases such as *Wygant* ... and *Fullilove . . . which did not involve any proven violations of law.*" *Id.* at 1078 (emphasis added).

The description of *Fullilove* as a situation which did not involve any proven violations of law is also applicable here, where the evidence of discrimination relied on by Appellant is similar to *Fullilove.* This case falls clearly in the category of cases in which there are no proven violations of law. Appellant's numèrous references to alleged discriminatory conduct by private persons should not be allowed to substitute for actual proof of discrimination required by decisions of this Court.

III. GENERAL POPULATION STATISTICS ARE AN INADEQUATE BASIS FOR SHOWING THE EXISTENCE OF DISCRIMINATION REQUIRED BEFORE RACIAL PREFERENCES CAN BE UTILIZED IN AWARDING PUBLIC CONTRACTS

A. *Decisions of this Court*

The actions taken by the Richmond City Council, and Appellant's arguments, fundamentally rely upon the difference between the percentage of public contracts awarded by the City of Richmond to minority prime contractors, and the percentage of minority citizens in Richmond. *E.g.*, Appellant's brief, p. 20.

This reliance is clearly misplaced, in view of numerous decisions by this Court limiting the uses of general population statistics in proving racial discrimination. Two cases from the employment context are often cited to demonstrate the critical difference between the use of population statistics for demonstrating a racial

imbalance in jobs which require no special expertise (held appropriate in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 339-40 (1977)) and the use of such statistics in attempting to prove discrimination in employment requiring special skills or training (held inappropriate in *Hazelwood School District v. U.S.*, 433 U.S. 299, 307-09 (1977)). This distinction was recently reiterated in *Johnson v. Transportation Agency, Santa Clara County*, ____ U.S. ____, 107 S.Ct. 1442, 1452 (1987).

Even more significant, in the context of this case, was the acceptance of this distinction in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 1847-48 (1986).

B. ***Post - Wygant Decisions of Other Circuit Courts***

The degree of skill and expertise required for an individual or firm to act as a prime contractor on construction projects clearly falls within the category of occupations requiring, for purposes of analyzing statistical data showing an under representation of minorities in the relevant group, a comparison of the *relevant* population, not the general population. Significantly, all of the circuits which have considered this question since *Wygant* have reached the same conclusion on the insufficiency of general population statistics for this purpose.

In *J. Edinger and Son, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213 (6th Cir. 1986), *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), the circuit courts held that before a governmental entity may employ an affirmative action program using racial or ethnic classifications, there must be factual evidence of real racial discrimination. Reliance upon the disparity between general population statistics and the level of

minority participation in public contracting is insufficient.

In *J. Edinger and Son, Inc. v. city of Louisville, Kentucky, supra*, the city appealed from a grant of summary judgment in favor of the businesses challenging the minority vendor ordinance for the city. On appeal the city challenged the district court's conclusion that there was an insufficient statistical basis to justify the racial classification imposed by the city of Louisville. The city argued "that the large discrepancy between the percentage of minority residents and the percentage of business conducted with minority owned businesses sufficiently demonstrates a need for the legislation." *Id.* at 215.

In rejecting the city's argument on this point, the Sixth Circuit identified several flaws in the findings relied upon by the City of Louisville. The court recognized that general population figures could be relied upon to determine whether racial discrimination had occurred in a particular area of the work force. *Id.* (citing *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983)). The use of general population statistics could be used where there is a long history of racial discrimination. This history of discrimination must be corroborated by numerous independent studies and reliance on recent statistics where applicants for government jobs come from the general populace.

Where, as in *J. Edinger and Son, Inc.*, the affirmative action program was directed toward increasing the level of minority participation in the award of city contracts, and not to increasing the level of minority participation in the work force, the court held that "a more appropriate analysis would have focused on the number of minority owned contractors in the county rather than the number of minorities *per se*." *Id.* The same flaw exists in the Richmond program.

Other similarities exist between the facts in *J. Edinger and Son, Inc.* and the case *sub judice*. The fatally flawed evidence relied upon by the City of Louisville as the justification for its MBE program is essentially the same as that relied upon by the City of Richmond. According to the Sixth Circuit, "the hearings of the Board of Alderman simply rehashed the statistical disparity between the population distribution and the business operation distribution. No other evidence of discrimination was presented." *Id.* The same insubstantial evidence also was presented to the Richmond City Council.

Additionally, the *Edinger* court found, "there is no showing that actual discrimination has stunted the development of minority businesses. There are a host of social, economic, personal, and demographic factors which may account for the statistical disparity." *Id.* at 216.

Appellant has failed to identify any specific instance of actual discrimination which has resulted in the stunted development of minority businesses in the Richmond area. Appellant's brief, pp. 20-21. "Even assuming defendant was able to show that societal discrimination has caused a disproportionately small number of minority owned contractors, this is still an insufficient basis for imposing a racially classified remedy against innocent people." *J. Edinger and Son, Inc.*, 802 F.2d at 216.

The holding in *J. Edinger and Son* was later followed in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987). In this case the Plaintiffs successfully challenged the validity of San Francisco's affirmative action ordinance for minorities, women, and locally owned businesses in city contracting. In its order the Ninth Circuit emphasized the necessity of making findings of official discrimination before utilizing racial preferences. *Id.* at 932. As

in *Edinger,* reliance upon general population statistics was disapproved. *Id.* at 933-34. Also citing *Edinger,* the court held that "[c]ontract awards should reflect the pool of available contractors, *not* the city's ethnic makeup." *Id.* at 934 (emphasis in original).

In *Michigan Road Builders Association, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987), the court found that the Michigan legislature had relied upon insubstantial evidence to justify an affirmative action program. The legislature had "relied upon certain conclusory historical resumes of unrelated legislative enactments and proposed enactments, executive reports, and a state funded private study conducted in 1974." *Id.* at 590. If this type of evidence was found to be inadequate, the conclusory and speculative testimony offered to the Richmond City Council must surely be inadequate.

C. *Reasons for Not Utilizing General Population Statistics*

The inappropriateness of using general population statistics has also been recognized by Drew Days, former Assistant Attorney General for Civil Rights, who was the defender in the Supreme Court of the statute challenged in *Fullilove.* Days, 96 Yale L. J. at 481. While Mr. Days states that there is much that government at all levels can and should do to eliminate discrimination affecting minority owned businesses, he clearly recognizes the limits on utilization of statistics, particularly those dealing with general population figures, to show remediable discrimination:

> Although statistics play a necessary role in the inquiry, significant disparities between the percentage of minority members among all contractors as compared with the general minority population in a state or

> municipality, standing alone, would not provide a sufficient basis for the implementation of a set-aside program. *Id.*

Days notes the difference between the use of general population statistics for employment without special qualifications, and situations in which the employment requires "qualifications not possessed by the general population," in which decisions such as *Hazelwood, supra,* have rejected reliance on general population statistics. In language particularly applicable to this case, Mr. Days observed:

> Because government contracting falls into this latter category, the relevant question is whether there is a significant disparity between the percentage of minority contractors eligible to handle government contracts and their percentage representation among those actually bidding for or awarded such contracts. *Id.*

It is thus apparent that the Fourth Circuit's rejection of the city's reliance on general population statistics to show discrimination was entirely consistent with previous decisions of this Court, and with the views of at least one highly respected advocate of remedial racial preferences.

There are other defects in the statistical data relied upon by the City of Richmond, including the failure to consider the amount of work subcontracted to minority firms during the time period considered by the City. This omission, in and of itself, renders the City's findings suspect, because it may "seriously undercount" the amount of work which minority businesses have actually engaged in on city construction projects. See *Associated General Contractors of California v. City and County of San Francisco,* 813 F.2d at 933 (9th Cir. 1987).

The most fundamental defect, however, in the City's statistical data is the reliance on the general population statistics. As observed by the Court of Appeals, the "appropriate comparison is between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialties. Showing that a small fraction of city contracts went to minority firms, therefore, does not itself demonstrate discrimination..." in view of the low number of minority owned contracting businesses in Richmond. *Croson*, 822 F.2d at 1359. (Emphasis by the Court).

The reasons for this virtually unanimous rejection of general population statistics in this context would appear to be at least four-fold.

First, such data is inherently unreliable, with respect to proving discrimination, because such statistical disparities may exist "completely unrelated to discrimination of any kind." *Wygant*, 106 S.Ct. at 1848.

Second, to the extent that the existence of such data confirms the existence of "societal discrimination," this Court's decisions make clear that this is an insufficient basis upon which a state or municipality can enact a program embodying racial preferences. *Id.* at 1847.

Third, reliance on population statistics could readily lead to political manipulation of programs aimed to assist minority businesses, particularly where the minority group being aided is politically powerful within the political subdivision seeking to utilize the perference. *Croson*, 822 F.2d at 1358-59.

Fourth, reliance on such data is inherently inconsistent with the judicially imposed limitations on utilization of racial criteria: to ensure that the means chosen extend no further than necessary.

At stated in *Fullilove*, 100 S.Ct. at 2775-76, there is a need for careful judicial review to ensure that a program utilizing racial criteria for a remedial purpose is "narrowly tailored to the achievement of that goal." In the absence of meaningful findings, it is virtually impossible to apply the Court's narrowly tailored test. See *J. A. Croson Company v. City of Richmond*, 779 F.2d 181, 202 (4th Cir. 1985) (dissenting opinion by Judge Wilkinson).

CONCLUSION

Amicus respectfully requests that this Court affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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